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ACTIONS BY TRUSTEES IN BANKRUPTCY.

Prior to the decision of the Supreme Court of the United States in *Bardes v. Bank*, 2 N. B. N. Rep. 725, (1900), that District Courts have no jurisdiction in actions by trustees "except by the consent of the proposed defendant," the weight of authority in the lower Federal Courts was in favor of such jurisdiction. The Court of last resort in so deciding did not overlook *Ex parte Christy*, 3 How. 292, (1845) and the other cases holding that Congress could not confer exclusive jurisdiction upon State Courts in such actions, but nevertheless relegated the trustee to the State Courts.

Claffin v. Houseman, 93 U. S. 130, (1876), decides that State Courts *may* exercise jurisdiction in such cases, but neither that nor any other authority holds that they *must*. "Not that Congress could confer jurisdiction upon the State Courts but that these courts *might* exercise jurisdiction in cases authorized by the laws of the state, and not prohibited by the exclusive jurisdiction of the Federal Courts."

It was doubtless pointed out in the argument of the *Bardes* case that the denial of the jurisdiction of the District Court must necessarily render the Bankruptcy Act of July 1, 1898, not only less useful than the Acts of 1841 and 1867, but practically inoperative so far as its anti-preferential features were concerned.

If the State Courts refuse to entertain suits to set aside preferences, how can the Act be carried into effect?

In *Fry v. Trust Co.*, 195 Pa. 343, (1900), the jurisdiction of the State Court was not questioned, the Supreme Court of Pennsylvania merely affirming an order refusing to give to an assignee in bankruptcy a judgment for want of a sufficient affidavit of defence.

It may be fancied that the point is merely of academic interest, but the question has in fact already arisen. In *Lyon, trustee, v. Clark*, 2 N. B. N. Rep. 792, (1900), the

Supreme Court of Michigan has ruled that the courts of that state must not entertain jurisdiction of actions by trustees to reach property transferred contrary to the provisions of the Bankruptcy Act, holding it "more consistent with the dignity and independence of the state tribunals to decline to take jurisdiction in cases arising under that act—if such jurisdiction theoretically existed—rather than expose themselves to collisions and conflicts with the United States Courts, or subject their proceedings to the control of those courts in attempting to adjudicate them."

This was and is the settled law of Michigan: *Voorhis v. Frisbie*, 25 Mich. 476, (1872); *Sheldon v. Rounds*, 40 Mich. 425, (1879); *McMaster v. Cambell*, 41 Mich. 513, (1879), which it would seem that the Supreme Court of the United States is powerless to change. Decisions elsewhere are to the same effect: *Gilbert v. Priest*, 65 Barb. 444; *Brigham v. Claflin*, 31 Wis. 607; *Bromley v. Goodrich*, 40 Wis. 131.

In *Copp v. L. & N. R. R. Co.*, 43 La. Ann. 511, (1891), state jurisdiction of a suit under the Interstate Commerce Act for unlawful discrimination is denied. *Battin v. Kear*, 2 Phila. 301, (Sharswood, J.), and *Dudley v. Mayhew*, 3 N. Y. 9 (1849), (both decided before the jurisdiction of the Federal Courts in patent cases was expressly made exclusive) hold that as the rights of the patentee spring wholly from the Federal Statutes, (Act of Congress, July 4, 1836, § 17), the State Courts would not take jurisdiction.

Missouri River Telegraph Co. v. First National Bank, 74 Ill. 217, (1874), denied jurisdiction of an action against a national bank to recover penalties for exacting usury.

In *Newell v. National Bank*, 12 Bush 57, (1876), usury was pleaded and an attempt made to set off the forfeiture declared by the Act of Congress, but the State Court refused to enforce the penalty.

In an interesting and exhaustive note to *Loughlin v. McCaulley*, 48 L. R. A. 33, (186 Pa. 517, 1898), the general subject of the "Administration of Federal laws in State Courts" is ably discussed, and it is shown that the great weight of authority is in favor of concurrent jurisdiction, unless the State Courts are expressly excluded by Act of

Congress. Among the Pennsylvania cases are: *Bletz v. Bank*, 87 Pa. 87, (1878); *Bank v. Gruber*, 91 Pa. 377, (1879); *Bank v. Karmany*, 98 Pa. 65, (1881). But no intimation can anywhere be found of a power reserved to *compel* State Courts to take jurisdiction, much less to compel them to take *exclusive* jurisdiction against their will. This would seem to be clearly beyond the power of Congress. So that it may be strongly urged that, as construed in *Bardes v. Bank*, the Act of 1898 is either not "uniform," or it is an unconstitutional infringement upon the rights of the states.

It would appear to flow from this that if the Bankruptcy Law is to persist as a "uniform" system, an amendment is called for, or the *Bardes* case must be reconsidered. In this rather surprising situation, growing out of our dual form of government, it may be of interest to notice some of the constructions of the Act of 1898, which would lead to a more happy issue.

Pursuant to the plenary powers granted to Congress by the Constitution of the United States "to establish uniform laws on the subject of bankruptcy throughout the United States" to which "power there is no limitation":¹ and which "may be exercised with the same latitude as the like power has been or may be by the British Parliament:"² the Act of July 1, 1898, was passed, investing the District Courts, *inter alia*, (§2) "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to" . . . "(6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for a complete determination of a matter in controversy;" "(7) cause the estates of bankrupts to be collected and distributed, and determine controversies in relation thereto, except as herein provided:" . . . "(18) tax costs, whenever they are allowed by law, and render judgment therefor against the unsuccessful party or the successful party for cause, or in part against each of the parties, and against estates in proceedings in bankruptcy; . . . Nothing in this section contained shall be construed to deprive a Court of

¹*In re Irvine*, 1 Pa. L. J. 291, (Baldwin, J.).

²*Kuntzler v. Kohaus*, 5 Hill 317, (Cowen, J.).

Bankruptcy of any power it would possess were certain specific powers not therein enumerated," this broad and extensive delegation of power being qualified only by § 25 b., which provides that "Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

At least three interpretations favorable to Federal jurisdiction have been ably advanced by excellent authorities. These may be briefly noticed:

I. THAT JURISDICTION WAS CONFERRED AND WAS NOT TAKEN AWAY BY SECTION 23 b., BECAUSE THAT SECTION LIKE SECTIONS 23 a AND 23 c, REFER ONLY TO THE JURISDICTION OF THE *Circuit Courts*.

This reasonable theory was first advanced by Judge Adams,³ and has been followed in four cases.⁴

Judge Adams said, (91 Fed., page 372): "A trustee appointed under the Bankrupt Act although an officer created by an Act of Congress is not by reason of that fact alone, as in the case of a receiver appointed to wind up the affairs of a National Bank, entitled to resort to the Circuit Courts of the United States for the enforcement of his rights as such officer, but must stand in the shoes of the bankrupt himself with respect to instituting suits in the Circuit Courts of the United States. In other words, Section 23, when properly construed, seems to me to mean that so much of the Act of March 3, 1887, and August 13, 1888, as confers jurisdiction upon the Circuit Courts of the United States of a suit in favor of an officer holding title under a law of the United States is inoperative with respect to the officer known as a trustee under the Bankrupt Act. Subdivision (a) is in the nature of a prohibition addressed to the United States Circuit Courts from exercising jurisdiction in any case between the trustee and an adverse

³*In re Sievers*, 91 Fed. 366, (1899).

⁴*In re Newbury*, 97 Fed. 24, (Severens, J.). *Trust Co. v. Marx*, 98 Fed. (456), (Evans, J.). *In re Murphy*, 2 N. B. N. R. 393. *Cox v. Wall*, 2 N. B. N. R. 572, (Ewart, J.).

claimant, unless the bankrupt himself could have resorted to the Circuit Court for the assertion of such claim against the adverse claimant. Subdivision (b) reinforces the prohibition of subdivision (a), but in this instance the prohibition is addressed to the trustee instead of the Circuit Court as found in subdivision (a). Both subdivisions when read together in my opinion, relate to the same subject matter, and that is to the jurisdiction of the United States Circuit Courts and to that alone. They limit the jurisdictions of such courts to hear and determine such actions only between a trustee and an adverse claimant, as a bankrupt himself might have prosecuted against such claimants in those courts because of diverse citizenship, and require a trustee when asserting a claim through the right of title of a bankrupt to resort to a State Court unless the bankrupt might have resorted to a Federal Court. This section, taken as a whole, appears to me to be only a curtailment of the jurisdiction of the Circuit Court and not at all applicable to District Courts or their jurisdiction as already in the act conferred upon them. This is more manifest when it is considered that District Courts, as such, are not mentioned in the section, while the Circuit Courts are in terms alone referred to in subdivisions (a) and (c). Subdivision (b) is found located immediately between subdivisions (a) and (c) and in the same act conferring a broad and comprehensive jurisdiction upon the District Courts as Court of Bankruptcy. Now applying two familiar rules of construction of statutes; one of which is condensed in the maxim '*noscitur a sociis*' and the other requiring the Courts to so construe any act as to give force and effect to each and all of its parts, I am disposed to hold that subdivision (b) relates to the same subject matter as that found in the immediately preceding and following subdivisions namely, to the jurisdiction of the Circuit Courts of the United States and particularly to the matter of providing a remedy which is there taken from such courts, and that this subdivision finds full scope for application in such places in which the District Court in full charge of the given cause, because of the fact that the debtor or adverse claimant resides without the territorial limits of the juris-

diction, cannot afford a remedy, and in which the Circuit Courts might have had jurisdiction except for the provisions of Section 23. In such cases the State Courts have exclusive jurisdiction unless there is such diversity of citizenship as permits recourse to the Circuit Courts. It may be that a trustee by virtue of subdivision (b) under consideration may at his election resort to any State Court as a court of competent jurisdiction in any case for a remedy, but as to this I am not called upon to express an opinion. I am, however, clearly of the opinion that subdivision (b) does not exclude a resort to this Court in any proceeding by the trustee arising within its territorial jurisdiction."

2. THAT JURISDICTION WAS CONFERRED AND WAS NOT TAKEN AWAY IN CASES OF FRAUDULENT OR PREFERENTIAL TRANSFERS, BECAUSE THESE SUITS ARE NOT SUCH AS "THE BANKRUPT . . . MIGHT HAVE BROUGHT."

To Judge Brown of the Southern District of New York⁵ belongs the honor of first having announced the distinction between ordinary rights of action formerly belonging to the bankrupt, and those rights of action which are peculiarly the creatures of the act. This may be said to be the most popular construction enunciated prior to the *Bardes* case.⁶

It is well stated by Judge Baker in *Carter v. Hobbs*:⁷ "It seems to me to be clear that where the trustee brings a suit to enforce a right of action which never existed in the bankrupt, the District Court has ample jurisdiction to maintain it. The trustee's right of action in such a case is not a derivative one, growing out of a prior right possessed by the bankrupt, but his right is original, created by law, and in the enforcement of it he represents the creditors, and his

⁵*In re Gutwillig*, 90 Fed. 481.

⁶*In re Brooks*, 91 Fed. 509, (Wheeler, J.). *Carter v. Hobbs*, 92 Fed. 595, (Baker, J.). *In re Crystal Spring Co.*, 96 Fed. 945. *Murray v. Beal*, 97 Fed. 569, (Marshall, J.). *Lowell on Bankruptcy*, 412. *In re Murphy*, 2 N. B. News 393. *Pepperdine v. Headley*, 98 Fed. 863, (Phillips, J.). *In re Connolly*, 2 N. B. N. R. 557, (E. F. Hoffman, Esq., Referee).

⁷92 Fed. 595.

suit is in effect the exact equivalent of a creditor's bill to reach property fraudulently transferred."

3. THAT JURISDICTION WAS CONFERRED, AND THAT SECTION 23, RELATING MERELY TO VENDUE, PREVENTED SUIT IN ANY DISTRICT OF WHICH THE DEFENDANT WAS NOT AN INHABITANT "UNLESS BY CONSENT OF THE PROPOSED DEFENDANT."

Perhaps the ablest plea in favor of jurisdiction was by Judge Amidon of North Dakota,⁸ whose opinion is well worthy of careful perusal. Judge Baker, by independent processes, afterwards reaches the same conclusion.⁹

Jurisdiction of the subject matter cannot be conferred by "consent" though jurisdiction of the parties may,¹⁰ and hence it is strongly urged that the only effect of Section 23 (b) is to prevent any suit except in the circuit of which the defendant is an inhabitant, unless by his "consent"¹¹

Judge Amidon, after summing up the difficulties in the case,¹² concludes: "We will now endeavor to find a construction of the Bankruptcy Act which will harmonize its different provisions. The solution of the whole difficulty is indicated by the last phrase of subdivision 'b' of Section 23.—'unless by consent of the proposed defendant.' Those courts which have denied jurisdiction have entirely passed over this clause. It certainly renders impossible their construction of the balance of the subdivision. If the limitation which the statute imposes may be set aside by consent of the defendant, then it must relate to a matter wholly subject to his discretion. But according to the interpretation of those courts that deny jurisdiction, it relates to the jurisdiction of the subject matter. It is elementary, however, that juris-

⁸*In re Woodbury*, 98 Fed. 833.

⁹*Shutts v. Bank*, 2 N. B. N. & R. 320.

¹⁰As to the meaning of "consent:" see *In re Connolly*, 57 Leg. Int. 164, (Apl. 20, 1900, McPherson, D. J.), 9 Dist. Rep. 217.

¹¹*Shepard v. Graves*, 14 How. 505. *Wickliffe v. Owings*, 17 How. 47. *Evans v. Gee*, 11 Pet. 80. *Hartzog v. Memory*, 116 U. S. 588.

¹²*In re Woodbury*, 98 Fed. 833, (1900). (See also *Hall v. Kincell*, 2 N. B. N. R. 745, where the U. S. Circuit Court of Appeals for the Ninth Circuit (Gilbert, Ross and Morrow, Circuit Judges) quotes with approval from Judge Amidon's opinion.)

diction of courts as respects the subject matter cannot be left to the discretion of the parties. That jurisdiction must be created and defined by law, and if it does not exist the action of the Court is nullity, notwithstanding the most solemn stipulation of the litigants. My conclusion, therefore, is that subdivision 'b' does not relate to jurisdiction of courts, but to the venue of suits. Under the Federal statutes in force at the time the bankrupt law was passed, a defendant, with certain exceptions not now important, could not be sued in a district of which he was an inhabitant; and in case the district was divided into divisions he could not be sued except in the division of which he was a resident. The object of subdivision 'b' was to apply this restriction specifically to suits brought by trustees under the Bankruptcy Act but that act furnishes still more direct cause for the limitation. Under Section 45 the trustee need not be a resident or citizen of a district in which the proceeding is pending; he need not maintain an office in the district. It would frequently occur that a majority of the creditors, especially in the case of insolvent merchants, would be residents of a district other than that of the bankrupt. Take for example the states of Wisconsin, Iowa, Indiana and Michigan. It might easily happen that a majority of the creditors of a bankrupt in either of these states would consist of the wholesale dealers at Chicago; and such creditors might naturally prefer to place a trustee from their own community, with whom they are personally acquainted, in control of the bankrupt's estate. If this should occur, it would be possible for such a trustee to sue any debtor of the estate from either of the states named, in the district of Illinois if he should be found there; for it is well established that when one sues in a representative capacity, it is his own, and not the residence or citizenship of the person represented that fixes the venue and jurisdiction of Federal Courts: *Coal Co. v. Blatchford*, 11 Wall 172, 20 L. Ed. 179. It was this possible hardship that Congress had in mind when it adopted the language contained in subdivision 'b.' But these statutes forbidding the suing of a defendant in a district of which he is not an inhabitant, or a division of which he is not a resident, creates only a personal

privilege, which the defendants may waive, and which he does waive unless he makes timely objection. *Improvement Co. v. Gibney*, 160 U. S. 217, 16 Sup. Court 272, 40 L. Ed. 401. It was to give force to this rule that the last phrase of subdivision 'b' was employed—'unless by consent of the proposed defendant.' In the light of these considerations the words in subdivision 'b' 'in the courts where' should be given their obvious sense as relating to venue, and not be construed as meaning 'in the courts which would possess jurisdiction.' Giving to subdivision 'b' this construction brings all the provisions of the bankruptcy act on the subject into harmony, and also harmonizes the Act of 1898 with previous statutes of the same character as they have been interpreted by the highest Federal Courts."

Some of the general considerations in favor of jurisdiction may be thus summarized:

1. Jurisdiction undoubtedly existed under the Acts of 1841¹³ and 1869¹⁴ notwithstanding less explicit grants thereof.

2. Congress has not the constitutional power to give State Courts exclusive jurisdiction.¹⁵

3. The power of a Court of Equity, having once taken jurisdiction of a rem, to fully adjudicate all questions relating thereto as in the analogous case of receiverships.¹⁶

4. The express power to appoint receivers for the preservation of estates (§2) in whom is vested, by operation of law the title to the property transferred in fraud of creditors, (§70).

¹³*Ex parte Christy*, 3 Howard 312. *Mitchell v. Manfg. Co.*, Fed. Cases 662.

¹⁴*Sherman v. Bingham*, Fed. Cases 12762. *Goodall v. Tuttle*, Fed. Cases 5533, (1872). *Lathrop v. Drake*, 91 U. S. 516, (1875).

¹⁵*Martin v. Hunter*, 14 U. S. 304, 330. *Houston v. Moore*, 18 U. S. 1, 27. *Robertson v. Baldwin*, 165 U. S. 275, (1896). *McLean v. Bank*, Fed. Cases 8885, (McLean, J.). *Sterns v. U. S. Fed. Cases* 13341. 1 Kent. Comm. 399, 400. 2 Story Const., (3rd Ed.), §§ 1752-1755.

¹⁶*Murray v. Beal*, 97 Fed. 568, (1899). *Porter v. Sabin*, 149 U. S. 473. *White v. Ewing*, 159 U. S. 36.

5. These canons of construction are involved :

- (a) An exception must be strictly construed.
- (b) A remedial statute is to be liberally expounded.
- (c) Apparently conflicting clauses must, if possible, be so interpreted as to give effect to both.
- (d) The absurdity of first granting plenary jurisdiction and then withdrawing it in the same act.
- (e) Section 23 "a" would be entirely nugatory because Section 23 "b" applies to all courts.

6. "Congress did not intend to trust the working of the bankrupt system solely to the State Courts of twenty-six states."¹⁷

Judge Lowell has contributed an exhaustive opinion to the literature of the subject,¹⁸ where the cases are collected.

Ira Jewell Williams.

August, 1900.

¹⁷*Ex parte* Christy, 3 How. 312.

¹⁸*In re* Hammond, 98 Fed. 845.